for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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FROM THE PHOENIX DESK... A COMPENDIUM OF DUI ISSUES, TIPS AND ASSORTED NONSENSE

By Gary Kula, Assistant Contract Director City of Phoenix

It may be helpful for you to be aware of the criteria used by an officer in making the decision whether to process a DUI as a felony. The following is taken from the May 9, 1997 edition of the City of Phoenix Police Department Operations Digest:

When processing suspects charged with violating A.R.S. § 28-692(A)(1), 28-692(A)(2), and/or 28-692(A)(3), the following cases should be submitted directly to the Maricopa County Attorney's Office:

- Suspects who have two prior DUI convictions within the past five years.
- Suspects charged with DUI who have companion charges of A.R.S. § 28-473(A) and/or 28-473(B).
- Suspects charged with DUI who have a person under 15 years of age in the vehicle.
- Misdemeanor DUI arising from the same set of facts that involve a felony -- For example, a suspect may be charged with DUI and possession of marijuana. In this instance, **all** charges should be sent to the Maricopa County Attorney's Office for review.
- DUIs that involve accidents giving rise to serious injury -- Serious injury is defined as that "...which creates a reasonable risk of death, or which causes serious and permanent disfigurement, serious impairment of health or less or protracted impairment of the function of any bodily organ or limb." A.R.S. § 13-105(34).-- **It is important that the suspect actually caused the accident that gave rise to the injuries.**
- DUIs involving an accident that causes temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or

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a fracture of any part -- **It is important that the suspect caused the accident.**

A MUST! NHSTA PUBLICATIONS

Anyone who has ever tried a DUI case has run into an expert who claims that there is an overwhelming consensus in the literature and scientific community that everyone is impaired at a .08 blood/breath alcohol concentration. Most of these experts will go on to say that this consensus has been in place for many years. In order to effectively refute this statement, you need look no further than NHSTA's own publications and literature reviews over the past several decades.

One of the first NHSTA publications you may want to look at is *Legal Aspects of Alcohol and Drug Involvement in Highway Safety - Alcohol Countermeasures Literature Review*, dated July 1975, DOT publication number DOT HS-801 656, Contract number DOT-HS-4-00965. The first subject area looked at in this publication is Alcohol Ingestion and Driver Performance. In the first two studies cited, both taken from the *Journal of Safety Research*, Volume 5, Number 3, September 1973, the findings certainly dispute the .08 impairment myth. In the first (Perrine) study, it was found that neuromuscular activities such as standing steadiness, though affected by alcohol, are not yet conclusively established as an indicator of impaired driving at BACs from .08% to .15%. In the second study (Huntley) cited by this NHSTA publication, research was done on the affects of alcohol on closed course driving. In his study, Huntley concluded that while there is a high probability of impairment at BACs between .05% and .075%, BACs even as high as .13% are not always sufficient to indicate impairment. Other factors cited by Huntley included driving skill, drinking experience, and others factors which can modify the affects of alcohol on driving skills.

In a more recent NHSTA publication, *Effects of Low Doses of Alcohol on Driving Related Skills: A Review of the Evidence*, dated July 1988, DOT HS807 280, additional studies were examined to determine whether a consensus exists as to the BAC level at which impairment begins. In this literature review, a number of driving related tasks such as reaction time, tracking, cognitive functions, visual functions, perception, psychomotor performance, and driver performance were all examined to determine the range of scientific opinions as to the BAC levels where impairments start. This literature review listed dozens of studies where the findings were inconsistent with impairment occurring at blood alcohol levels below .11. As to each of the driving related skills examined, the following is a summary of the studies reviewed:

This literature review listed dozens of studies where the findings were inconsistent with impairment occurring at blood alcohol levels below .11.

Reaction Time: **22** studies found impairment starting at BACs greater than .10
13 of the 22 studies found impairment starting at BACs greater than or equal to .15

Tracking: **12** studies found impairment starting at BACs greater than .10 (range .11 - .20)

Divided Attention: **5** studies found impairment starting at BACs greater than .10 (range .11 - 12)

Information Processing: **11** studies found impairment starting at BACs greater than .10 (range .11 - .18)

Driver Performance: **14** studies found impairment starting at BACs greater than .10 (range .11 - .16)

Visual Functions: **8** studies found impairment starting at BACs greater than .10 (range .11 - .15)

Psychomotor Performance: **25** studies found impairment starting at BACs greater than .10 (range .11 - .21)

Visual/Time Perception: **9** studies found impairment starting at BACs greater than .10 (range .11 - .20)

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To order a copy of these studies, you can call "NTIS" at 1-800-553-6847 or contact Dan Carrion at the Maricopa County Public Defender's Office for information on obtaining these documents through the Internet.

CLOSING ARGUMENT IN A "DUI" REFUSAL CASE

Perhaps there is no fact pattern more fertile for stories and analogies in closing argument than the "DUI" case where there is a refusal to submit to blood or breath testing. For a closing argument to be effective, the jury must be led to understand the presumption of innocence in the context of a refusal. If you want an analogy that the jury can relate to and laugh at (if you act it out----- remember smiling juries never convict) you may want to consider the following:

Go back to the first day when you came to this courthouse to report for jury duty. As many of you remember, there were two lines which led past the security check-point. The line that you were required to stand in went through what looked like a big door frame that worked as a metal detector, surrounded by security guards. Do you remember what happened either to you or someone around you? You went through your pockets and removed everything metal: coins, pens, paperclips, and anything else that you dug up out of the bottom of your pocket. Satisfied that you were metal-free, you then went through the metal detector and "BZZZT", the alarm went off. The metal detector and the security guards were there, of course, to make sure that no guns or weapons are brought into the courthouse. So, after the alarm went off, you were told to step back, check your pockets again, and walk back through the detector. There was nothing left in your pockets, so again you walked through and again the alarm screams out "BZZZT". Shaking your head, you stepped back through, took off your belt, walked through the detector and "BZZZT". As you frantically patted yourself down and removed your shoes and rings and prepared to go through the metal detector for the fourth time, everyone around you started to murmur that maybe you have a metal plate in your head. You cautiously walked through the detector again, and again, "BZZZT". Finally, as you stepped through the metal detector half naked, the alarm remains silent and the guard is satisfied. Throughout this ordeal, you noticed that there was a second line, without a metal detector, where someone carrying boxes and briefcases full of who knows what, walked up, just held up a card and the guard, with a smile, waived them through without looking twice.

Perhaps there is no fact pattern more fertile for stories and analogies in closing argument than the "DUI" case where there is a refusal to submit to blood or breath testing.

This is exactly what we are talking about when we talk about the presumption of innocence. Unlike those who have to undress in order to go through the metal detector successfully, my client has a card that allows him to bypass the metal detector, which is the breath machine in this case. That card is the presumption of innocence. What the judge is going to tell you is that my client is entitled under the law and the Constitution to carry the card that says "I am presumed innocent." While the Prosecutor may argue, "the State would have had additional evidence if he walked through that metal detector or he submitted to the breath test," -- but that's not how our system of justice works. The card or the presumption of innocence requires the State to prove and present evidence, on their own, beyond a reasonable doubt, that my client had consumed too much alcohol, and they have failed to do that. The presumption of innocence means that my client does not have to walk through the metal detector, does not have to submit to a breath test, and that if the State can't present proof and can't prove impairment because of the refusal, you must come back and say, "not guilty."

When you consider the issue of the refusal, remember that card and remember the presumption of innocence. This trial, this courtroom, is about fairness and about justice. Our system of justice guarantees each one of us a card, a presumption of innocence which allows us the right to bypass the metal detector as we defend our innocence against wrongful accusations.

WORST RULE OF EVIDENCE JOKE

Why did the rookie prosecutor watch reruns of the Gong Show?

He was told to research Prior Bad Acts. ■

¿A *QUE* TENGO DERECHO? (I HAVE THE RIGHT TO *WHAT*?)

Moving for Translated and Transcribed Witness Statements

Jim Haas, Senior Deputy Public Defender

*One of our attorneys had a case where a "bilingual" police officer gave Miranda warnings to a client in Spanish. The client did not recall having been advised of his rights. At a pretrial hearing, the police officer was asked to repeat exactly what he said to the client, in the presence of a court interpreter, so that the interpreter could assess the accuracy of the reading of the rights. According to the interpreter, the police officer had advisedthe client that he had the right to "**spare parts**."*

Translation from Spanish to English is more art than science. Because of the many cultural and dialectic distinctions that are prevalent in both the English and Spanish-speaking worlds, even the most competent translator misinterprets from time to time. While these mistakes can be harmless and even humorous in most situations, they can be devastating when the statements being translated form the basis for criminal charges against our clients.

Because of the many cultural and dialectic distinctions that are prevalent in both the English and Spanish-speaking worlds, even the most competent translator misinterprets from time to time.

This is one reason that the Court Interpreter's Office is so vital to our practice. Its interpreters have the education and experience to recognize these subtle differences before simple misunderstandings turn into miscarriages of justice.

In several recent cases, the prosecution has given our attorneys copies of tapes of Spanish-speaking witnesses, without any translation or transcription, as part of their Rule 15 discovery. We are told that no translation or transcription has been done. After all, the police reports contain a summary of what the witnesses said (in the opinion of the "bilingual" police officer). That's good enough for the prosecution, which does not plan on having a translation or transcript made. If we want a translation or transcription, we will have to obtain it ourselves. (Of course, if we do this, they want a copy).

This presents a number of problems. Obviously, the defense cannot accept the police officer's summary of what the witnesses said on faith. See "**spare parts**" story above. Even ignoring the question of the officer's qualifications to accurately translate the statements, there is the issue of the officer's bias or prejudice. Like most people, police officers tend to hear what they want to hear, even when they speak the same language as the witnesses. And what they usually want to hear is **guilt**.

So the defense **must** have an accurate translation of the witnesses' statements. Without it, we cannot evaluate the evidence and the strengths and weaknesses in our client's case, cannot adequately advise our client, cannot negotiate a reasonable plea, and cannot prepare for trial. In short, we can't do much of anything.

All that seems axiomatic. But when we seek to have the tapes translated by the Court Interpreter's Office, we run into another axiomatic truth of our criminal justice system: the Court Interpreter's Office does not have enough staff to do translations of tapes (at least not in this century).

To complicate the problem, it is not enough that we have the tapes *translated*; we must have them *transcribed* also. Unlike a tape in English, which we can listen to whenever necessary in preparation for trial, the translation is not available to most of us unless it is also transcribed.

So what now? Several solutions have been proposed. The first, and most frequently-made, suggestion, is "DIY" (do it yourself). It is suggested that we have one of our bilingual staff members do the translation and transcription. Disregarding the obvious problem that we are already buried in tape transcriptions, and are nearly as understaffed as the Court Interpreter's Office, the question of the qualifications of the translator arises. As well meaning as our staff member's intentions may be, will she or he recognize those subtle nuances in dialect that may make the difference between an inculpatory and an exculpatory statement? What happens when our staff member's translation conflicts with the police officer's summary of the statements? Who breaks the tie? Do we have to put our staff person on the stand as an expert witness? How do we establish foundation? How will our staff person stand up to cross-examination, when pitted against a police officer? Is it fair to put a staff person in this position?

And, perhaps most important, can we use the transcript of the tape at trial at all, if it is translated and transcribed by an uncertified translator who is arguably biased in favor of our client? How will this affect its admissibility, and its impact?

There are an infinite number of problems with the DIY approach. And they don't go away when the next

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most-frequent suggestion is made, that we hire someone outside of the office to do the translation and transcription. Translators/interpreters who possess the requisite experience and skill to do this work properly are hard to come by (just ask the managers of the Court Interpreter's Office). A tiebreaker would still be needed. Bias would still be alleged. Etc., etc., etc.

The bottom line is that our clients have a constitutional right to an accurate, admissible translation and transcription that is prepared by a court-certified, independent translator. Such a transcript is an essential, basic tool of preparing and presenting a defense. As such, it is guaranteed by the Due Process and Equal Protection clauses of the U.S. and Arizona Constitutions. The only acceptable translator is one appointed and paid for by the court, and the most logical place to go is the Court Interpreter's Office.

The bottom line is that our clients have a constitutional right to an accurate, admissible translation and transcription that is prepared by a court-certified, independent translator.

Clear as all this may seem to us, it is likely that you will have to file and argue a motion in order to obtain the translation and transcript that you and your client need. There is ample support for such a motion in the case law. A sample motion setting follows on page sixteen (16). It is basic and generic, and should be modified and improved for your case. If you would like to use this motion, it can be found at S:\PD Forms\Translat.Mot.

Incidentally, the **"spare parts"** *story is true. Just ask Bob Billar.* ■

CAPITOL IDEAS

By Russ Born, Training Director and Meg Wuebbels, Legislative Relations Coordinator

Just before the dawning of the 1997 legislative session, it appeared that it would be business as usual. Namely, that the law enforcement organizations would get every bill passed, upon which they put their stamp of approval. This wasn't due to a lack of interest or a particular mind set on the part of the legislators. But rather because of a lack of information being presented to counter the arguments made by law enforcement interests.

Certainly law enforcement interests are well represented at the capitol. The Maricopa County Attorney's Office has three full time lobbyists as well as a full time intern who works on legislative matters. In addition, there are other lobbyists from the Arizona Prosecuting Attorney's Council, the Department of Public Safety, the Phoenix Police Department, the Pima County Attorney's Office, the Maricopa County Sheriff's Office, and the Attorney General's Office. That brings us to a grand total of at least nine lobbyists, all of whom sit on the same side of the teeter-totter.

Some balance was in order. In the past, legislators themselves had sought out diverse viewpoints on particular crime bills, only to come up empty handed. There was no one at the legislature who could provide them with the relevant information in a timely fashion.

Dean Trebesch acknowledged that some of our past efforts to bring a balance to the legislative process were well received by the legislators. But he also realized that our success was very limited. Although many legislators sought out differing viewpoints to balance those offered by the law enforcement community, our ability to provide the information was limited. We did not have a presence at the legislature and our efforts came a little too late.

Legislative Relations Coordinator

Realizing that the only effective way to remedy this situation was to have a full-time presence at the legislature, Dean Trebesch created the job of Legislative Relations Coordinator.

Margot Wuebbels, an attorney in the office with prior lobbying experience tackled the job. What she found was a legislature more than willing to listen to opposing views, especially when these views were presented in a logical, poignant manner, exposing the dangers, flaws and financial cost of some of the wide-sweeping criminal legislation.

Although this is the first time our office created such a position, it is not a unique situation. The Cook County Public Defender's Office in Chicago has had a legislative liaison position since 1987. They too have found that legislators want to have opposing views presented and want to avoid creating legislation which may later lead to greater cost, re-trials or have the effect of snaring innocent people in the criminal web. Even though Meg was somewhat outnumbered, she received a warm reception from members of both legislative houses and managed to influence a number of bills. Let me discuss just a couple which I think were significant.

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The Suspended License, Class 6 Felony!!!!

This bill would have made driving on a suspended license a class 6 felony if the suspension was for a prior misdemeanor D.U.I.. When the effect of such legislation was explained, via its financial impact on the courts, the clogging up of the felony dockets, along with turning hundreds of citizens into felons with a disportionate impact on the working poor, the legislation did not pass.

Felony Junk Car Possession?

There were two separate bills that sought to raise the penalties (no minimum value needed) for possession of a stolen motor vehicle and unlawful use of means of transportation from class 6 felonies to class 5 felonies. That was a tough battle! But in the end many of the legislators realized that the open ended class 6 felony served a legitimate rehabilitative purpose and was a needed classification. Also, there was the looming specter of more jury trials on cases which normally plea.

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Necessity/Judicial Discretion

Two other accomplishments are worth special mention. First there is the codification of the common law necessity defense. This is patterned after Ill. Rev. Stat. Chap 38 §7-13. The second was Meg's tireless battle to allow judicial discretion for sentencing under ARS 13-604.01. Meg succinctly explained to the legislators why a *mandatory* life sentence of 35 years should really be *discretionary*. After much debate, the legislation passed, allowing for judicial discretion.

Next year should be even more exciting and satisfying. For now though, Meg has summarized the legislation that affects our practice. Take it away Meg, and congrats for a job well done! (By the way, once the session ended, Meg returned to her trial attorney activities until next year.)

The New Legislation

1997 was a busy legislative year. The Legislators worked on over 50 bills that effected our office in some way. Although some (thankfully) failed, many passed. Unless otherwise noted, they all take effect July 21st at noon. Here are the highlights:

- After all Paul Prato's hard work on *State v. Tarrango*, the legislature amended A.R.S. 13-604 with the express intent of overruling *State v. Tarrango*. Additionally, the legislature corrected what had previously been considered an oversight in the definition of "historical felony conviction" to include Aggravated DUI with two or more DUI's within the previous sixty months.

- In a housekeeping measure all common law affirmative defenses were abolished. (A.R.S. 13-103) Affirmative defense was further defined not to include any defense that either denies an element of the offense or denies responsibility through either alibi, misidentification or lack of intent. The defense of entrapment was codified to fit the version established in case law.(A.R.S. 13-206) Additionally, the defense of necessity, previously unrecognized in Arizona, was codified and added to the list of available defenses at ARS 13-416.

- 13-1209- Person's convicted of drive-by shootings are now subject to forfeiture of their vehicles under Chapter 39.

- 13-603 -If a person is sentenced to serve consecutive terms of probation after serving a term in prison, the court may waive the term of community supervision and order the term of probation to begin immediately upon the person's release. The court also has the power to waive the term of community supervision retroactively. ARS 13-107 - The statute of limitations for serious offenses as defined in 13-604 is tolled if the identity of the person who commits the offense or offenses is unknown.

- ARS 13-2006- Criminal impersonation was raised to a class 6 felony and the definition was expanded to include pretending or assuming the identity of a person or organization with the intent to gain access to a person's property.

- ARS 13-1405- Sexual conduct with a minor who is under fifteen years of age is raised to a class 2 felony IF the person is the minor's parent, stepparent,

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adoptive parent, legal guardian or foster parent. This offense requires mandatory prison.

- ARS 8-286 -ARS 8-290.22- Extends victims' rights to the victim's of crimes committed by juveniles, including a provision that states that Prosecutor's are NOT required to forward any correspondence from the juvenile defendant, the juvenile defendant's attorney or anyone else acting on behalf of the victim or any one acting as the victim' representative. ARS 13-4405.01 extends notification for victims to person's arrested pursuant to a warrant. Currently notification is only required for probable cause arrests. NOTE: this law was passed as an emergency measure and already is in effect. ARS 13-604.01 - Persons tried as adults who are convicted of a Dangerous Crime Against Children in the First Degree of a minor under 12 years of age for the crimes of attempted first degree murder, second degree murder, sexual assault or sexual conduct with a minor MAY be sentenced to a life sentence of at least 35 years. If a life sentence is not imposed the presumptive term remains 20 years.

- The Omnibus Crime Bill - made several changes in the criminal code many of which are favorable to our clients.

  * The crime of facilitation no longer requires that the under lying crime be completed (meaning it is now possible to plead to facilitation on an attempt.)

  * Theft of a credit card is expanded to include unlawful use of the credit card numbers. For misdemeanor theft of a credit card the limit was raised from $100 to $250, Class 6 felony theft of a credit card was raised from $100 to $250 and capped at $1000, Class 5 felony is $1000 and over.

  * Forgery of a credit card was raised to a Class 4 felony.

  * Minors have an additional defense to misconduct with weapons charge if they are engaged in activities requiring the use of a firearm related to poultry, livestock, crops or the production of agricultural commodities.

- The Omnibus Drug Bill made several technical changes to the law including elimination of the Class 4 open ended offense for possession of amphetamine, manufacture of drugs within a drug free school zone aggravates any sentence given by one year, established a threshold amount for possession of amphetamine of 9 grams.

- Creation of statewide drug courts/Implementation of Proposition 200- Although Drug courts were around before Proposition 200 became law, the Legislature used this bill as an opportunity to expand the successful Maricopa county program statewide and to alter some of Proposition 200. The supporters of Proposition 200 are adamantly opposed to any alterations in the proposition and are planning some action to thwart this bill from taking effect. In the meantime it will become law on July 21st. The following is merely a brief summary-

  *ARS 13-901.01- First or second possession of Marijuana and first time possession of dangerous or narcotic drugs is probation eligible unless the a person has two or more historical prior felony convictions which are NOT for drug possession, or has been convicted of a violent offense as defined in 13-604 or involving serious physical injury or the use of a deadly weapon/dangerous instrument. Persons convicted of drug possession in the above stated circumstances and placed on probation shall participate in drug treatment. This does not apply to persons who have previously been convicted of possession of marijuana, dangerous drugs or narcotic drugs two or more times.

  * ARS 13-3422 - Established drug courts. The following persons are NOT eligible: previously convicted of a serious offense under ARS 13-604, convicted of an offense under Chapter 14 of the criminal code, is presently enrolled or was previously enrolled in a drug diversion program, with in the past five years the person has been offered and refused to participate in a drug diversion program, presently enrolles or previously enrolled in a drug court program. For purposes of this offense, age of the conviction does not matter. Persons assigned to drug court and found guilty of an offense that is eligible for probation, at the discretion of the court, and without entering a judgement of guilt may be placed with the concurrence of the State and Defense Counsel on probation without any further proceedings. As term of drug court the person may be sentenced to serve a term in jail not to exceed one year. Failure to successfully complete drug court MAY result in revocation of probation. Successful completion of probation

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MAY result in dismissal of the charges against the person.

- Hate Crimes- ARS 13-702 now allows for enhanced penalties if the defendant intentionally selected the victim because of the race, religion, color, gender, sexual orientation, national origin or ancestry of the victim or because of the defendant's perception of the race, religion, color, gender, sexual orientation, national origin or ancestry of the victim. ■

JAMES PARK HONORED BY STATE BAR

Trial Group B attorney, James Park, has been awarded a Certificate of Appreciation from the Young Lawyers Division of the Arizona State Bar in recognition of his positive contributions to the bar and the public. The Young Lawyers Division noted Jim's many accomplishments, and in particular praised his participation in the Redress Appeal Project that the Arizona Asian-American Bar Association established to assist individuals of Japanese descent who were deprived of their civil rights during World War II. The Division noted that Jim's activities promote a positive public perception of attorneys, and that "the State and National Bar could use more attorneys of (Jim's) caliber."

The Maricopa County Public Defender's Office also received a certificate of recognition in honor of Jim's contributions to the bar and the public, which will be permanently displayed with the other awards in the Training Facility.

Congratulations, Jim, and thanks for promoting a positive perception of our office and profession! ■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

UNITED STATES V. AMLANI (9th Cir. 1997) 1997 U.S. App. LEXIS 7576

Prosecutors' pretrial disparagement of retained defense counsel was alleged as improper interference with 6th Amendment right to counsel of one's choice if it caused defendant to retain different counsel than originally desired. Prejudice flows from this even if the replacement counsel is effective and competent. Although remanding for further factual findings, the court held that such prosecution actions, deliberately disparaging the attorney and destroying the client's confidence in order to cause a change in counsel would support reversal of the conviction on that basis. The fact that the statements were made in front of the first (fired) lawyer did not cure the error, and earlier statements made before the 6th Amendment right arose would be considered in determining the issue. If the government disparaged original counsel in defendant's presence and this caused defendant to retain different counsel the conviction must be reversed.

The court also resolved against defendant claims of five separate Brady violations, seizure and review of two documents prepared by defendant's attorneys and related to the case, six claims of prosecutorial misconduct (mostly in argument), curtailment of cross examination of the victims, alleged errors in the instructions, and a claim of double jeopard because of an earlier related civil forfeiture.

UNITED STATES V. PADILLA (9th Cir. 1997) 1997 U.S. App. LEXIS 7123

The three related defendants operated a cocaine transportation organization for hire. They paid a border patrol agent for the use of a car, and they hired a driver, packaged the cocaine with an eye towards concealing the contents and directed the routes for the driver to take. The driver was stopped by police, consented to a search, and then finished the delivery to the Padillas under the control of the police. The defendants challenged the search of the car, but were held to have no standing on which to make this claim. The court held that they did not have a sufficient possessory interest in the cocaine, which was merely being transported for others. Nor was there a sufficient expectation of privacy in the mislabeled packages of contraband. None of the defendants had a property interest in the car or a reasonable expectation of privacy that was invaded by the search of the car.

UNITED STATES V. MIGUEL (9th Cir. 1997) 1997 U.S. App. LEXIS 7120

At a trial resulting in a hung jury the eleven year old victim testified via closed circuit television regarding sexual offenses. Defendant got a transcript of this. Before the second trial, pursuant to a federal statute the court ordered videotaped deposition of the victim to be taken with the defendant not present in the room, but able to follow the proceeding through closed circuit television. The statute provides that if a defendant is excluded from physically being present, he shall be provided with a means of "private, contemporaneous communication with [counsel]

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during the deposition." The judge refused to allow defendant to have telephonic contact with counsel during the questioning, but would allow counsel to consult with defendant during breaks in the deposition. Both of defendant's lawyers sat in the deposition room, but only one could conduct questioning. The deposition was very similar to the testimony at the first trial. At the close of questioning defense counsel did not take a recess to confer before ending the deposition, which was played for the jury in the second trial. Defendant was convicted of two counts, and acquitted of one.

The Ninth Circuit held that the trial court's arrangements did not comport with the law, since defendant was guaranteed simultaneous communication with counsel, not delayed communications at counsel's discretion. They also held that the error was harmless beyond a reasonable doubt where defendant could have had one lawyer with him, had a transcript that was similar, and did not claim that there was something he needed to communicate during the deposition, therefore it was more probable than not that the error did not affect the verdict.

The argument that the proceeding violated the 6th amendment right to confront witnesses and cross examine was also rejected because the appeal did not point to any particular area, topic, or question that the accused was prevented from relaying to his attorneys. Any potential error was harmless where there was no described cross examination that was precluded.

The 6th amendment right to counsel was not violated because one of the lawyers could have been with the defendant during the deposition, also watching on the closed circuit monitor, and counsel could call for a recess to confer with defendant. The appellate court was not sure if the second lawyer also would have been prohibited from telephone contact with the lead attorney, but noted that unlike the defendant, the second lawyer could confer with the client, and enter the room where the deposition was occurring to confer or advise of the need for a break or additional questions.

UNITED STATES V. ROSS (9th Cir. 1997) no citation for F.3d or LEXIS avail.

In 1980, a bomb was mailed to a realtor with whom the defendant was engaged in litigation. Its explosion killed the realtor's secretary. Despite suspecting defendant, and a possible co-defendant, a mistaken premise by investigators hampered indictments until 1988. Ross was charged with aiding and abetting the mailing of an explosive device with intent to harm or kill. Two others, who were thought to have built and mailed the bomb, were also indicted as principals, although the theory was that Ross was the one who initiated and sought the bombing. Ross's first trial in 1989 ended in a hung jury. The government dismissed the indictment without prejudice because the government felt it had a better chance of conviction if the codefendant, awaiting extradition, was also present. When extradition brought the codefendant back in 1993, Ross fled to Canada, but was arrested after a few months and voluntarily returned for trial on the re-indictment. The codefendant was tried and convicted separately, and Ross again got a hung jury in 1994. At the third trial in 1995 he was convicted.

The court found that there was no prejudice from preindictment delay. The defendant's claims that various witnesses had died, precluding favorable testimony, were rejected because the allegedly lost testimony would have been cumulative, or was speculative only, or was testimony that, although admitted in the second trial, was precluded in the third, making the loss of witnesses moot. The court did not need to balance the reason for delay against the prejudice because there was no proof of actual prejudice to the defense. This allowed them to avoid deciding if the dismissal to await the codefendant in order to make Ross' conviction more likely was in bad faith, unlike a decision to join defendants for reasons of economy and efficiency.

In order to convict the jury had to find Ross did some act with the purpose of aiding the commission of the crime of mailing the bomb with intent to harm or kill. There was evidence from which a jury could find that Ross made two phone calls to the associate who mailed the bomb. Combined with evidence of Ross' motive, and flight, there was sufficient evidence from which a jury could find the essential elements beyond a reasonable doubt.

At the third trial Ross testified that he suspected his son or brother of the bombing, and of making the calls to the associate. The prosecutor cross examined by asking about the years of silence on this topic. The court did not have to decide if the 1988 Miranda warnings carried over the years after the first indictment was dismissed because it found the questions impeaching Ross with his silence to be harmless beyond a reasonable doubt where there were numerous other instances of falsehood by the defendant. So the question of how long the right to remain silent warning stays in effect is still unclear. [No discussion of why the numerous character witnesses introduced at the second trial, resulting in a hung jury, were precluded from testifying in the third trial. Apparently not an issue on appeal.] ■

Don't forget it's NEWSLETTER CONTEST time.....so get writing!

All entries submitted from May through July will be considered.

ARIZONA ADVANCE REPORTS A Summary of Criminal Defense Issues: Volume 242

By Terry Adams
Deputy Public Defender-Appeals

State v. Hughes 242 Ariz. Adv. Rep. 50 (S. Ct. 5/6/97)

Capital murder case reversed. The defendant's girlfriend's body was found in a remote desert area. She had been strangled. There was very little evidence connecting him to the crime. The defendant, however made some incriminating statements regarding her death. The defendant and two others were indicted for murder, hindering prosecution, and conspiracy to commit a class 5 felony(hindering). The defendant was convicted and sentenced to death. The prosecution sought to introduce evidence of the defendant's prior bad acts including two fire bombings, various threats to other individuals, violence toward others and his extensive drug dealings. The state argued that the fire bombings, and response to those who angered him demonstrated intent and modus operandi. Also since the states theory was the defendant had someone commit the crime that evidence of threats and violence and drug dealing was relevant because his occupation at the time was that of a drug dealer, his relation with the victim centered around drugs and a possible motive was that she had interfered with his business. The supreme court held that there were no similarities between the arsons and the murder to establish common scheme or m.o. Also where a defendant denies committing the charged crime the intent exception of 404(b) is not a basis for injecting prior misconduct into the trial. The rest of the evidence merely showed that the defendant acted in conformity with a violent, vengeful character which is precisely what 403 and 404(b) prohibit. The trial court also erred in admitting defendant's derogatory views of women under 404(a). Because of the volume of this evidence introduced it was not harmless error. The court found there was insufficient evidence to support a conviction of hindering because the body was concealed. One cannot hinder prosecution of others where his own charges arise out of the same set of facts. This case and *State* v. *Ives*, 187 Ariz. 102 (1996) are excellent discussions on what is and is not admissible under Rules 403 and 404.

State v. Jones 242 Ariz. Adv. Rep 35 (S. Ct. 4/29/97)

Capital murder case, conviction and sentence affirmed. Defendant lived in a trailer with Angela Gray and her children. Gray's youngest daughter Rachel was four years old. On the day before her death, Rachel was hit many times. One blow to her abdomen was so severe that it ruptured her small intestine. There were also injuries to her genitalia. The defendant was seen striking her as they rode in his van. Traces of her blood were found in the van. Rachel became very ill and the defendant refused to take her for treatment until the following day at which time she died of peritonitis--an infection caused by the ruptured intestine. The defendant was charged and convicted of sexual assault, three counts of child abuse, and felony murder. He was sentenced to death. He challenged his conviction of child abuse because A.R.S. § 13-3623 (B) requires the defendant to have "care or custody of a child" when he causes injury to the child. The court defines "care" and "custody" to mean accepting responsibility for a child in some manner. Since the child lived with defendant and he acted as a parent the evidence was sufficient. The trial court refused to allow evidence that Gray had hit her older daughter before this incident. Before this type of evidence can be admitted the defendant must show that the evidence has an inherent tendency to connect such other person with the actual commission of the crime. Here the defendant failed to make such a connection, therefore the evidence is inadmissable. The defendant moved to suppress evidence seized from his trailer because the police initially entered without a warrant. The police entered to check the welfare of the other children. Factors necessary to enter under the "emergency aid" exception are (1) whether police have reasonable grounds to believe that someone needs assistance; (2) whether the search is motivated to seize evidence; and (3) is there a basis to associate the emergency with the place to be searched. The evidence here justified the initial entry. There was sufficient evidence to show that the death resulted from action taken to facilitate accomplishment of the underlying felony, sex assault, to show felony murder. The defendant argued that since Gray had a greater responsibility for Rachel's care than he and she did not seek care therefore he was not responsible for her death and therefore not eligible for the death penalty. The court rejected the assertion that a parent's guilt exonerates a non-parent in this type of circumstance. The court found that the murder was especially cruel because of the suffering of the child.

State v. Tiscareno 242 Ariz. Adv. Rep 62 (C.A 5/8/97)

The defendant was convicted of agg assault for breaking his girlfriends nose. The question on appeal was whether or not a broken nose is "a fracture of any body part" under A.R.S. §13-1204(A)(11). It is.

State v. Hackman 243 Ariz. Adv. Rep. 3 (C.A. 5/13/97)

The state's investigator contacted the defendant in custody and served a search warrant for his property after he had been appointed counsel. The trial court suppressed

(cont. on pg. 11)☞

all the evidence obtained as a result of the search and all statements made by the defendant to the investigator because of the violation of his right to counsel. The court of appeals affirmed the suppression of the statements but reversed the suppression of evidence based upon the "independent-source doctrine" because the state had obtained sufficient evidence to obtain a warrant from statements made by the defendant prior to the appointment of counsel and it could have been served on the jail without contact with the defendant.

State v. Garcia 243 Ariz. Adv. Rep. 46 (C.A. 5/22/97)

The defendant was convicted of theft, a class 3 felony. He had three prior felony convictions, two in 1985 and one in 1992, all class 4's. At sentencing the court found that the 1992 conviction was an historical prior because it fell within the five year period prescribed in A.R.S. § 13-604.U.1(c) and that he had three or more prior felony convictions under (d). Therefore he was sentenced with two historical priors to 11.5 years. The court of appeals found that he could only be sentenced with one historical prior because the priors must be counted chronologically, from oldest to most recent, for purposes of sub-§(d). Therefore only the 1992 prior could be used as the third prior felony, and since that was already used as the first historical prior, it could not be double counted and used as the second.

Holmberg v. De Leon 243 Ariz. Adv. Rep. 43 (S. Ct. 5/22/97)

One year and three months after defendant's arraignment the state filed a notice to seek the death penalty. The defendant moved to strike the notice as untimely under Rule 15.1(g)(1). The trial court denied defendant's motion, this special action followed. The Supreme Court held that his delay was "particularly egregious" and granted relief by striking the notice. The court reasoned that capital litigation is so unique that notice must be given within the limits of the rule. The court did not hold that violation of the letter of the rule would always void the notice, but left open such circumstances as late discovery of aggravating factors and lack of prejudice to the defendant because of previous oral notification. The court also condemned the practice of filing the notice on every first degree murder case to avoid late filing. ■

SEMINAR ANNOUNCEMENT

REGISTER NOW!

Kids in Adult Court

"Juvenile Justice Reform: It's Better to Know Some of the Questions than all of the Answers"

When: Friday, July 18,
Location: Hyatt Regency - Phoenix
Time: Registration/ 12:45 - 1:15
Seminar/1:15-4:30

Contact Francis Dairman at 506-7569 for registration or further information.

This program may qualify for up to 3.00 hours CLE with the State Bar

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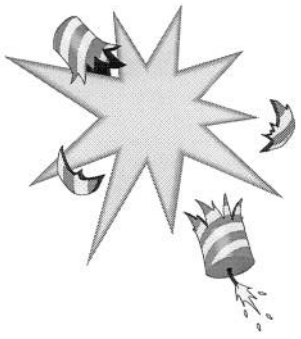
HAVE A SAFE AND HAPPY FOURTH OF JULY!



BULLETIN BOARD

New Attorneys

Jason Leonard, who has been working as an Administrative Coordinator at SEF Juvenile, will be sworn-in July 1. He will begin practicing as an Attorney I at SEF Juvenile. Mr. Leonard obtained a B.A. in Criminology from Florida State University and a J.D. from Nova Southeastern University-Shepard Broad Law Center. In 1995, he worked as an intern in the Dade County Public Defender's Office.

Attorney Moves/Changes

Several attorneys are leaving the office; **Karen Clark, Amy Curtis, Rob Rosette, Charlie Vogel** and **Vonda Wilkins**.

New Support Staff

The following individuals have been selected as Summer Public Defender Clinic Students; **Marguerite Breidenbach, Jeffrey Mehrens, Mary Goodman, and Rodney Mitchell.** All are students at ASU College of Law.

Geoffrey Budoff is an Administrative Coordinator I at the South East Juvenile Facility.

Richard Lilly has been hired for a two-month stint as a law clerk in Trial Group A. He is a graduate of the University of Wisconsin Law School. Prior to joining our office, Mr. Lilly was a practicing attorney in Milwaukee, Wisconsin with the firm of Butler Rodgers Law Offices.

Support Staff Moves/Changes

Trial Group D Legal Secretary, **Jody Wilkins,** is leaving the office.

Philippa Lee has resigned her position as a legal secretary in Trial Group C. ■

COMPUTER CORNER

by Susie Tapia and Gene Parker

If you can read this your too close!

Is everything getting smaller?
Feel like Alice in Wonderland?
Just hooked up to the Internet?

If you have just received access to the Internet you may have noticed the fonts in your GroupWise appear smaller. No, it's not time for an eye check up, the fonts actually did get smaller. When the Internet access was setup in your Windows the display driver (a file that lets Windows know the type of monitor you are using) was upgraded to allow better viewing of web sites. This resulted in smaller fonts in your applications.

To change the fonts in your GroupWise open the section you want changed, In box, Out box, Trash, Calendar, Send Mail, Read Mail, etc. Choose **Edit**, **Font** then select a new size. Font changes affect only the text area of the window. In the Send Mail window only the text of the message is changed, the To:, From:, and Subject areas are not affected when changing fonts.

Internet Tip:


Internet

The Public Defender's home page contains a link to the Staff Resources area. Resources available to date are:

- Bulletin Board
- Search the Web (Search Engines)
- Criminal Law Web Resources
- DUI/Vehicular Web Resources
- Investigative Resources
- Arizona Legislature Information Service (A.L.I.S.)
- Public Staff Directory
- Internal Staff Directory

Internet Basics Classes are available now. See your monthly calendars.

For assistance contact the Help Desk x6198.

Happy Computing! ■

MAY, 1997
Jury & Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
4/30-5/20	Tosto/Jones	Cole	Heilman	CR 96-09911 Sexual Assault(x2)/F6 Agg Assault/F6 Kidnap./F2	Guilty	Jury
5/1-5/7	McAlister/ Yarbrough	Sargeant	Hicks	CR 96-08755 Mscndct. Inv. Weapons w/2+ priors/on probation/F4	Guilty	Jury
5/5-5/8	Green	Dougherty	Hudson	CR 95-06015 Agg Assault/F3D	Not Guily Guilty of lesser included Disorderly Conduct/F6D	Jury
5/7-5/13	Timmer/ Yarbrough	Mangum	Newell	CR 97-00771 Agg DUI/F4	Guilty	Jury
5/8-5/15	Curry/Greth	Galati	Gadow	CR 96-06027 Agg Assault/F3D	Not Guilty	Jury
5/21-5/23	Hernandez/ Yarbrough	Comm. Hicks	P. Hicks	CR 96-11841 Burglary/F3 Theft/F5 w/2 priors/on probation	Not Guilty all counts	Jury
5/27-5/28	Timmer/ Yarbrough	Hilliard	Newell	CR 97-01413 Agg DUI/F4 w/1 prior and on release	Guilty	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
4/23-4/24	Yvette Gray	Wilkinson	Terri Clarke	CR 96-10122 Aggravated Assault, F3	Guilty	Jury
4/28-5/7	Charles Vogel/Ames & Corbett	Hotham	Rachel Mitchell	CR 92-09153 1 ct. Kidnapping, F2 1 ct. Sex. Assault,. F3 1 ct. Burglary, F3	Guilty on all counts	Jury
5/5-5/5	Troy Landry	Gastelum Maryvale Justice Ct.	Carolyn Robinson	MCR 96-01697MI 1 ct. Criminal Damage, M2 1 ct. Threatening & Intimidating, M1	Not Guilty	Bench
5/5-5/7	Joel Brown	Hotham	Marc Pappalardo	CR 96-04544 1 ct. Misconduct Involving Weapons, F4	Guilty	Jury
5/5-5/7	Yvette Gray	Arellano	Bob Gorman	CR 96-09395 1 ct. Theft, F3 1 ct. Possession of Crack Cocaine, F4	Not Guilty of Theft Guilty of Possession of Crack	Jury

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
4/28 - 4/30	Corbitt Beatty	Hendrix	Gundacker	CR90-90717 DUI, F5	Guilty	Jury
5/14	Schmich	Goodman	Drexler	CR96-01710MI Assault, M1	Not Guilty	Bench
5/19 -5/22	Bingham	Hendrix	Smyer	CR96-93568 Aggravated Robbery, F3	Not Guilty	Jury
5/28 - 5/29	Bingham Thomas	Hendrix	Rueter	CR97-91701 Aggravated Assault, F6	Guilty	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
5/6 - 5/6	Schreck	Hilliard	Boyle	CR97-00357 Poss. of Crack F4	Guilty	Jury
5/7 - 5/8	Bevilacqua	Dunevant	Armijo	CR97-00723 PODD, PODP F4, F6	Mistrial	Jury
5/8 - 5/12	Dichoso-Beavers/ Bradley	Dougherty	Linn	CR96-11287 Burglary in the Third Degree F4	Guilty	Jury
5/8 - 5/13	Kibler/ Fusselman	D'Angelo	Myers	CR96-08284 Armed Robbery F2	Not Guilty	Jury
5/12 - 5/13	Bevilacqua	Dunevant	Armijo	CR97-00723 PODD, PODP F4, F6	Not Guilty	Jury
5/19 - 5/22	Schreck	Katz	Campagnolo	CR97-01864 Theft F6	Not Guilty	Jury
5/19 - 5/22	Jung	Chavez	Eckhardt	CR96-10364 Agg. DUI (2 cts) F4	Not Guilty - Impairment Guilty - BAC>.10	Jury
4/28 - 5/19	Hoff/ Bradley	Nastro	C. Lynch	CR96-12840 Murder 2 F1	Mistrial Not Guilty 2/Guilty 6	Jury
5/30 - 6/2	Hoff/ Fusselman	Pro Tem at Peoria JC	Robinson	TR96-07930 DWI M	Guilty on A1 Dismissed on A2	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
5/2-5/7	Patton/ DeSanta	Martin	B.Gorman	CR 96-10449 Agg.Asslt., F3D	Not Guilty	Jury
5/2-5/13	Allen	Ishikawa	T.Glow	CR 95-91905 Agg.Asslt., F3D	Not Guilty	Jury
5/20-5/29	Alldredge/ Abernethy	Gerst	J.Wendell	CR 96-08268 CR 96-07154 CR 96-02981 Ct.1: Consp.to Commit Frd.Schs. & Art., F2N Ct.2-20: Forgery, F4N Ct.21: Frd.Schs., F2N Ct.22: Forgery, F4N	Guilty on 18 cts. of Forgery; Hung on 4 other counts	Jury
5/8-5/16	Parzych	Hendrix	R.Puchek	CR96-92799 4 cts. Agg.Asslt.,F3D	Not Guilty on 1 ct. Guilty of lesser included Disorderly Conduct on 3 cts.	Jury
5/13-5/15	Ivy	Nastro	C.Coury	CR96-10015(b) Ct. 1: PODD, F5N Ct. 2: PODP, F6N	Not Guilty	Jury

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. * Defendant.	No. CR * MOTION FOR TRANSLATION AND TRANSCRIPTION OF TAPES (Assigned to the Hon. *) (Oral Argument Requested)

* moves that the court order the translation and transcription, by a court-certified interpreter or translator, of the tapes of Spanish-speaking witnesses that have been disclosed by the prosecution. Translation and transcription of the tapes are necessary to effectuate Mr. *'s rights under the due process clauses of the Fifth and Fourteenth Amendments to the U. S. Constitution and Article II, §§4 and 24 of the Arizona Constitution; the equal protection clause of the Fourteenth Amendment to the U. S. Constitution; and Rule 15, Arizona Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this ___ day of _____, 19__.

MARICOPA COUNTY PUBLIC DEFENDER

By: _____
*
Deputy Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of Facts

Mr. * is charged with *. In its Rule 15 disclosure, the prosecution listed * tapes containing statements of witnesses that it intends to call to testify against Mr. *. Copies of the tapes have been provided to defense counsel. The statements of the witnesses on the tapes are in Spanish. No translation of the statements has been made.

Argument

1. Mr. * has a constitutional right to translations and transcriptions of all taped statements of Spanish-speaking witnesses who may be called to testify against him by the prosecution.

Arizona Rule of Criminal Procedure 15.1(a)(1) requires that the state make available to the defendant the names and addresses of all of its witnesses "together with their relevant written or recorded statements." This is one of the state's *basic* discovery requirements, requiring no showing of need by the defendant. Every defendant's need for this fundamental discovery is conclusively presumed. Thus, the Arizona Rules of Criminal Procedure

recognize that statements made by witnesses who will be called to testify for the state against a defendant are "basic tools" of an adequate defense, which must always and automatically be provided to the defendant. In fact, it is hard to imagine any evidence that is more basic to the preparation of a defense than the statements of the state's witnesses. Without those statements, it is impossible to determine what the evidence will be, much less how it can be refuted.

The Fourteenth Amendment's due process and equal protection clauses guarantee the indigent defendant an opportunity to present his or her claims adequately and fairly. Ross v. Moffitt, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974); State v. Apelt, 176 Ariz. 349, 861 P.2d 634, 650 (1993). These constitutional guarantees assure the indigent defendant access to the "basic tools" of an adequate defense. Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985); Apelt, supra.

In Ake, the U. S. Supreme Court said:

> "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that ***justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake . . . [A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."*** 470 U.S. at 76; 105 S.Ct. At 1092 (Emphasis added).

When a defendant is indigent, the trial court has a constitutional duty to provide him with certain essential tools of trial defense. State v. Cornell, 179 Ariz. 314, 878 P.2d 1352, 1358 (1994), citing United States v. Sims, 617 F.2d 1371, 1375 (9th Cir. 1980).

The value of transcripts of witness testimony in prior proceedings has long been recognized and assumed. While the issue usually arises in the context of an appeal or a mistrial, the same logic applies in the case of pretrial witness statements. In Britt v. North Carolina, 404 U.S. 226, 228, 92 S.Ct. 431, 434, 30 L.Ed.2d 400 (1971), the U. S. Supreme Court said, ". . . even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses." The pretrial defendant has the same need for the transcripts as a discovery device and tool for impeachment.

The tapes that have been disclosed by the prosecution are useless to the defense until and unless they are translated and transcribed into English. Providing the defendant with taped statements that cannot be understood by the defendant or his attorney is tantamount to not providing the statements at all. The defendant cannot participate in a meaningful way in his defense if he cannot understand the statements of the witnesses that constitute the evidence against him. English translations of Spanish-language statements are basic and essential tools of an adequate defense that must be provided to the defendant.

2. The translation and transcription must be done by a court-certified translator who is independent

of the parties.

Transcripts of witness statements are useless unless they are accurate and, if necessary, admissible in evidence. It is therefore essential that the transcripts be prepared by a court-certified translator that is independent of the parties. No other alternative effectuates Mr. *'s constitutional right to the basic tools of an adequate defense.

The court should not require the defendant's attorney, a member of the Public Defender's Office, to have the tapes translated and transcribed. The Public Defender's Office is not an objective agency independent of the parties. If the Public Defender's Office hires a translator/transcriber, or has a staff member translate and transcribe the tapes, the questions of qualification and bias are certain to be raised when the defense attempts to use the transcript in trial. Translation from Spanish to English is not an exact science; there are many and various dialects and cultural factors that make a significant difference in how a statement in Spanish is translated into English.

Disputes often arise regarding the accuracy of translations. In State v. Verdugo, 180 Ariz. 180, 883 P.2d 417 (App. Div. 2 1993), the state moved to allow the jury to receive transcriptions that were made by bilingual police officers. The court had the court interpreter compare the state's translation to the tapes. The court interpreter testified that she had made "significant changes in the state's transcripts." 883 P.2d at 422. Without the review by the court interpreter, a court-certified translator who was independent of the parties, inaccurate transcripts would have been submitted to the jury.

In order for the defendant to be able to adequately prepare for trial, and to confront and impeach witnesses against him at trial, accurate and admissible transcripts are essential. It makes no sense, and is wasteful of scarce resources, to require either of the parties to transcribe the tapes, and then deal with the inevitable disputes by having an independent interpreter review the transcripts for accuracy. It makes far more sense to simply have the independent interpreter translate and transcribe the tapes in the first place.

Conclusion

For the foregoing reasons, the court should order the translation and transcription of the tapes by the Court Interpreter's Office or other independent, court-certified translator.

RESPECTFULLY SUBMITTED this ___ day of _____, 19__.

MARICOPA COUNTY PUBLIC DEFENDER

By: _____
*
Deputy Public Defender